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MICHAEL RODAK, J.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-921

NEWPORT ASSOCIATES, INC.,

Petitioner,

against

SHELDON H. SOLOW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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J. ROBERT ELLNER,
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IN THE

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OCTOBER TERM, 1972

No.

NEWPORT ASSOCIATES, INC.,

Petitioner,

against

SHELDON H. SOLOW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Newport Associates, Inc., prays that a Writ of Certiorari issue to review the Order, Judgment and Opinion of the Court of Appeals entered in the above-entitled case on April 26, 1972.

The Opinions Below

The opinion of the Court of Appeals and the concurring opinion, reported in 30 N.Y. 2d 263, 332 N.Y.S. 2d 617; the Order of the Court of Appeals reversing, without costs, and reinstating the Order and Judgment of the Special Term of the Supreme Court of New York County; and the Order denying Petitioner's motion for reargument, noted in 31 N.Y. 2d 709 are appended hereto as Appendix A, A-1 and A-2, *infra*, pp. 1a to 10a; the opinion (Memorandum Decision) of the Appellate Division, First Department of the Supreme Court of New York State, reported in 36 A.D. 2d 519, 317 N.Y.S. 2d 715; and the Order of the Appellate Division reversing the Order and Judgment of Special

Term are appended hereto as Appendix B and B-1, *infra*, pp. 11a to 14a; the opinion of Postel, J. (unreported Memorandum Decision) at the said Special Term, and the Order and Judgment of said Court, are appended hereto as Appendix C and C-1, *infra*, pp. 15a to 21a.

Jurisdiction

The Order of the Court of Appeals was entered on April 26, 1972. A timely motion for reargument was served on July 24, 1972 and duly filed in the Court of Appeals. The said motion was denied on September 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

The Question Presented

Is a zoning ordinance unconstitutional which, enacted seven years after execution of a lease, grants property rights not contemplated by the lease to a tenant (respondent) and thereby deprives the owner (petitioner) of such rights?

Constitutional Provisions and Ordinances

This case involves the Fourteenth Amendment of the Constitution of the United States and the New York City Zoning Resolution, and more particularly Section 12.10 of such Resolution which defines a "zoning lot." The pertinent provisions of Section 1 of the Fourteenth Amendment and of the Zoning Resolution are appended hereto as Appendix D, *infra*, pp. 22a and 23a.

Statement of the Case

In 1953 the predecessors in interest of the petitioner and the respondent entered into a lease for premises at 4 West

58th Street in the Borough of Manhattan, City of New York. The lease was for an initial term of 21 years with options to the tenant to renew in additional 21-year terms to the year 2052. The leased premises include a building fully occupied by the tenant.

The Zoning Resolution of the City of New York enacted in 1960 restricts the size of a building to one whose total floor area is less than a stated multiple of the ground area of the plot. The multiple is known as the "FLOOR AREA RATIO." In New York City it is referred to as the "FAR." In the instant situation, the FAR applicable to the zoning district within which the premises are located would permit the erection of a building on the leased premises containing 30,000 square feet in excess of the building which presently is on the premises and leased to the respondent-tenant.

A section of the Zoning Resolution (Appendix D) in defining a zoning lot to which the FAR is to be applied, provides that a zoning lot is one which is under a single ownership and in effect within a single perimeter. Thus, two or more tax lots, so long as their borders are contiguous, may constitute a single zoning lot if they are within a "single ownership." A further provision of this section in defining "single ownership" states that it shall include a lessee under a lease which grants a term of at least 50 years plus an option to renew for an additional 25 years.

Respondent-tenant, already the fee owner of the parcel of land adjacent to the leased premises, obtained without the petitioner's permission, and over its protest, an assignment of the lease on the subject premises. Upon obtaining such assignment he applied to the municipal authorities for, and was granted, the right under the Zoning Resolution to "appropriate" the 30,000 square feet of unused FAR on the leased premises and add such footage to the FAR of the building he built on the land he owned. It is

uncontroverted in the record that such "transfer" of the FAR from the subject building to the respondent's own building was effected 1) without the consent of the petitioner; 2) without payment of any compensation to the owner beyond the rental provided for in the lease; and 3) that such use of the FAR by the respondent excludes forever the petitioner's opportunity to utilize such FAR in conjunction with the ownership of adjacent land on the other side of the demised premises. As Judge Breitel, in his concurring opinion in the New York Court of Appeals said

> ". . . it was possible for either . . . whoever first acted, to use the same air development rights to the exclusion of the other."

and as Judge Scileppi said in the principal opinion

> ". . . whatever rights that plaintiff [petitioner] may otherwise have had were not lost by any act of the defendant [respondent], but rather as a result of the operation of the ordinance."

It is uncontroverted in the record that the lease between the parties was entered into seven years prior to the passage of the Zoning Resolution, with its peculiar definition of "ownership."

How Federal Questions Were Presented

The Court of Appeals Order, of which review is here sought, reinstated an Order and Judgment of the Special Term granting respondent's motion for summary judgment. The constitutional issue was raised in the affidavit of the petitioner's President submitted on that motion (Record transcript page 34). The affidavit argued that the defendant's motion for summary judgment should be denied and the plaintiff's granted "upon the ground that the

Zoning Regulation in question is unconstitutional, confiscatory, arbitrary and capricious, a deprivation of plaintiff's property without due process of law. . . ." In its brief to Special Term, petitioner further challenged the constitutionality of the Zoning Resolution.

The constitutional question was presented to the Appellate Division by the record above quoted and as one of the four questions presented in petitioner's brief to that Court (as well as in oral argument).

The second of the four questions presented to the Court was

> "2. Does the Zoning Regulation, the sole authority for such expropriation, violate the Constitutional rights of plaintiff-appellant [petitioner]?"

Again, before the Court of Appeals, in addition to the Record in Special Term (and oral arguments to the Court), the petitioner's brief presented as the second of three questions:

> "2. Does the Zoning Resolution, if applicable, violate the constitutional rights of plaintiff-respondent [petitioner]?"

Justice Postel in the Special Term did not in any way allude to the constitutional issue. In the Appellate Division, since the Special Term decision was unanimously reversed on the basis of New York real property law, the Court never reached any constitutional issue. In the Court of Appeals, neither the principal nor the concurring opinion dealt with, or alluded to, the constitutional question raised by both record and brief (and in oral argument).

Again, on the motion for reargument in the Court of Appeals, addressing itself to the fact that neither opinion of that Court dealt with the constitutional question, the

petitioner's brief on page 4 urged:

> "The Zoning Resolution can not constitutionally take away rights from one party and confer the same upon another."

and again on page 10, the petitioner respectfully submitted

> "that the Zoning Resolution authorizes a taking of property without due process of law and contravenes provisions of both the Federal and State Constitution."

Reasons for Granting the Writ

The Appellate Division of the Supreme Court of the State of New York (the intermediate appellate court) found it unnecessary to reach the constituitonal issue raised by the petitioner. In effect, that Court held that the lease itself prohibited the respondent's actions (opinion Appendix B). The Court of Appeals similarly found no authority within the corners of the lease, but ruled that by the ordinance the respondent was granted such right to the exclusion of the petitioner. This Court is therefore asked to rule on the question whether an ordinance operating in such a manner, or such interpretation of an ordinance, does not deprive the petitioner of property without due process of law.

It is clear that through the years since the passage of the Fourteenth Amendment, the States have been restricted by this Court from effecting deprivation of property without due process. More recently, this Court has held in Civil Rights cases that the States may not assist a private person in his attempt to discriminate in a way in which the States themselves were barred by the "privileges and immunities" and "equal protection" clauses of the Fourteenth Amendment.

The question this petition seeks to present for the Court's consideration is:

> Shall the due process clause of the Fourteenth Amendment be applied in the same way as the "privi-

leges and immunities" clause and the "equal protection" clause, i.e., Shall the States be restricted from assisting a person from depriving another of property without due process of law as they are restricted from assisting a person in discriminating against another?

For many years criticism abounded that the laws of the States and of the United States were "tipped" in favor of the protection of property rights. In recent years in the Civil Rights cases this Court and, by new statutes, the Congress have made clear to the world that this Nation is committed to the protection of the liberties and the civil rights of its citizens from the incursion by Government or by private persons assisted by Government.

But such commitment to Civil Rights can not have been intended to indicate a diminution of the protection to be afforded property rights. It has been fashionable in some milieu to denigrate the importance of property rights as though this Nation and this Court were unable to protect, simultaneously, both Civil Rights and property rights.

The Fourteenth Amendment, when first enacted, was intended to protect both. We urge that it is now timely for this Court to determine whether the property rights protection of the Fourteenth Amendment ought to be updated and brought to the level of protection afforded Civil Rights.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Order and Judgment and Opinion of the Court of Appeals of the State of New York.

Respectfully submitted,

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J. ROBERT ELLNER,
of Counsel

APPENDIX A

(Opinion and Concurring Opinion of Court of Appeals of the State of New York)

1. No. 529 71

NEWPORT ASSOCIATES, INC.,

Respondent,

vs.

SHELDON H. SOLOW,

Appellant.

SCILEPPI, J. This is an action to compel a determination of a claim to real property pursuant to article 15 of the Real Property Actions and Proceedings Law. There is no dispute as to the operative facts. Plaintiff is the owner in fee of a parcel of New York City land, improved by a building, known as 4 West 58th Street and defendant is in possession thereof, pursuant to a long-term lease which, by the exercise of certain options, will not expire until 2052. In addition to his leasehold interest in the subject property, defendant is the fee owner of two adjoining parcels: 10-40 West 58th Street and 9-25 West 57th Street. These parcels are contiguous with the leased premises and defendant is in the process of constructing a 45-story office building on its fee property. As an incident to this construction, defendant filed plans with the New York City Buildings Department and secured a building permit. The controversy between the parties centers upon this building permit and its effect on plaintiff's property rights.

The New York City Zoning Resolution sets certain limits on the quantum of floor space that a particular building may have. These limits, called floor area ratios, consist of

the total floor area on a zoning lot divided by the lot area of that zoning lot (Zoning Resolution, § 12-10). The existing building on the leasehold property does not represent a complete utilization of the floor area ratio for that building and hence there is surplus air space which is apparently buildable. Since defendant's fee property is contiguous to that which he leases, the municipal authorities, issuing the building permits, allowed defendant to incorporate the unused air space on the leased property in computing the maximum floor space for the building now being constructed on the fee property.

In this litigation, plaintiff has contended that the lease did not pass air space rights and that defendant's construction represents a diminution in the value of its reversionary interest; defendant has counterclaimed for a judgment sanctioning its construction. Both sides moved for summary judgment and Special Term, rejecting plaintiff's arguments, adopted the position that, under the applicable zoning ordinance, defendant was the owner of one zoning lot consisting of that which he held in fee and that which he leased; as such, the construction project was authorized. Additionally, the court concluded that plaintiff's damages, if any, were remote and speculative and that the construction was not violative of the lease. A judgment and order was entered granting defendant's motion for summary judgment, denying plaintiff's cross motion and declaring that defendant was authorized to use, in its construction, the unexpended and unused floor area ratio permissible and attributable to plaintiff's property. On appeal, the Appellate Division reversed and granted summary judgment to the plaintiff on the basis of section 4.03 of the lease which reads as follows: "Lessee may make such additions, alterations and changes to the Premises as will suit Lessee's convenience and requirements of its business, and the business of any tenants to whom Lessee may

lease portions of the Building, provided that such addition, change or alteration will not change the character of the Building and provided further that, no structural addition, alteration or change, the estimated cost of which is in excess of $25,000 will be made without prior approval of Lessor, which Lessor covenants shall not be unreasonably withheld." Inasmuch as defendant was utilizing the unused part of the floor area ratio for the leased premises on its fee property, the construction was not an alteration within the meaning of section 4.03. On the contrary, the court viewed it as an elimination of a valuable property right not vested in defendant by the lease. We reverse and reinstate the order and judgment of Special Term.

Although we agree that section 4.03, limited as it is to alterations of the leased building, should not be deemed a source of power authorizing defendant's utilization of unused air space in the construction of the office building on its property, we conclude that the court below has erroneously treated the section as dispositive of the litigation at bar.

The rather limited question presented in this appeal is whether defendant's construction of the office building on his fee property constitutes a wrong to plaintiff for which it may be given redress in this action. As previously stated, floor area ratios are computed on the basis of the size of a particular zoning lot. In section 12-10 of the Zoning Resolution a zoning lot is defined in the following manner: "(a) A lot of record existing on the effective date of this resolution or any applicable subsequent amendment thereto, or (b) A tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single *block*, which on the effective date of this resolution or any applicable amendment thereto, was in single ownership, or (c) A tract of land, located within a single *block*, which at the time of filing for a building per-

mit (or, if no building permit is required, at the time of filing for a certificate of occupancy), is designated by its owner or developer as a tract all of which is to be used, *developed,* or built upon as a unit under single ownership. A *zoning lot* therefore may or may not coincide with a lot as shown on the official tax maps of the City of New York, or on any recorded subdivision plat or deed." Thus, where several contiguous lots are in single ownership, they may be lumped together and treated as a "zoning lot" for the purpose of the floor area ratio computation. Ownership is defined to include long-term leasehold interests: "For the purposes of this definition, ownership of a *zoning lot* shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration." (*Id.*) Though defendant's lease, executed in 1953, had a minimum term of 21 years with options to renew for additional periods until the year 2052, it would appear that in issuing the building permit, the municipal authorities found that the lease satisfied the requirements of section 12-10. Defendant was, therefore, the owner of contiguous lots under the Zoning Resolution and as such was entitled to full utilization of air space rights. Inasmuch as there is no provision in the lease which precludes defendant's exercise of rights under the Zoning Resolution, it cannot be said that he has wronged plaintiff.

It is, of course, plaintiff's argument that with the 45-story building on the defendant's fee property, a valuable asset is destroyed since it loses the right to sell its air rights to owners of parcels adjoining the other side of the leased property. But this overlooks the fact that, in view of defendant's ownership of the adjoining building, his lease from plaintiff and the Zoning Resolution itself, plaintiff possesses no such right of sale. There is nothing in the ordinance which treats its reversionary interest as

ownership for the purpose of floor area ratios or air space rights. In other words, whatever rights that plaintiff may otherwise have had were not lost by any act of the defendant, but rather as a result of the operation of the ordinance. Since defendant did not violate any of the provisions of the lease, plaintiff is not entitled to relief.

Accordingly, the order appealed from should be reversed, without costs, and the order and judgment of Special Term reinstated.

BREITEL, J. (concurring). Plaintiff has lost by defendant's action, albeit without being wronged, a valuable asset in the air development rights over its building. It has thereby lost its right to "transfer" or use its air development rights by alienation of the reversion to an abutting owner, or by acquiring an abutting property. That right to transfer or exploit the air development rights required no warrant in the zoning ordinance. Air rights, including the special floor area ratios defined in the ordinance, are valuable and transferable, even if only as an adjunct to a reversion or to a long-term leasehold.

I conclude, however, that because the lease to defendant failed or was then unable to reserve air development rights to the fee owner, there is no restriction on defendant qualifying his abutting property under the ordinance and thus exploiting the otherwise unused air development rights of the leasehold. Plaintiff's mischance is that the rights were never reserved in the lease, and the ordinance, as a part of zoning design, allows them to be used in a special way as an adjunct to a fee or long-term leasehold, and thus gives them value. Indeed, under the ordinance it was possible for either the owner of the reversion or the holder of the long-term leasehold, whoever first acted, to use the same air development rights to the exclusion of the other.

The significance of the distinction is that lessors of long-term leaseholds may and perhaps would be wise to reserve

to themselves the use of the air space rights, including the floor area ratios.

Accordingly, I concur that the order appealed from should be reversed.

Chief Judge FULD and Judges BERGAN, JASEN and GIBSON concur with Judge SCILEPPI; Judge BREITEL concurs in a separate opinion in which Judge BURKE concurs.

Order reversed, etc.

APPENDIX A-1

(Order of Court of Appeals Reversing and Reinstating Order and Judgment of Special Term)

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th. day of April in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR April 26, 1972.

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1. No. 529. 71

Newport Associates, Inc.,
Respondent,

vs.

Sheldon H. Solow,
Appellant.

BE IT REMEMBERED, That on the 10th. day of December in the year of our Lord one thousand nine hundred and seventy-one, Sheldon H. Solow, the appellant—in this cause, came here unto the Court of Appeals, by Parker, Duryee, Zunino, Malone & Carter, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the

order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Newport Associates, Inc., the respondent—in said cause, afterwards appeared in said Court of Appeals by McLaughlin & Stern, Ballen and Miller, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. David W. Peck, of counsel for the appellant—, and by Mr. Leo Brady, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the order and judgment of Special Term reinstated.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

Appendix A-1

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 26, 1972.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
Clerk.

APPENDIX A-2

(Order of Court of Appeals Denying Motion for Reargument)

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-eighth day of September A. D. 1972.

Present, HON. STANLEY H. FULD, Chief Judge, presiding.

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1 Mo. No. 580

Newport Associates, Inc.,

Respondent,

vs.

Sheldon H. Solow,

Appellant.

A motion for reargument of the above cause &c. having heretofore been made upon the part of the respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

(SEAL) A copy

GEARON KIMBALL
Deputy Clerk

APPENDIX B

(Memorandum Decision of Appellate Division Reversing Special Term)

SUPREME COURT
OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

By Capozzoli, J.P., McGivern, Nunez and McNally, JJ.

3001. NEWPORT ASSOCIATES, INC., plf-ap, v. SOLOW, defres—Order and judgment (one paper), Supreme Court, New York County (Postel, J.), entered on July 21, 1970, unanimously reversed, on the law; appellant shall recover of respondent $50 costs and disbursements of this appeal; and declaratory judgment directed restraining the defendant from utilizing the unused floor area ratio applicable to plaintiff's real property located at 4 West Forty-eighth Street in the Borough of Manhattan for the benefit of defendant's property located at 10-40 West Fifty-eighth Street. Absent any provision in the lease authorizing it, defendant may not for its own purposes sever from and appropriate for the benefit of defendant's real property any part of plaintiff's property or the bundle of rights incident thereto. Defendant relies on section 4.03 of its lease which enables it to make additions, alterations and changes to the premises as will suit its convenience and requirements of its business or the business of any tenant of the lessee, provided the character of the plaintiff's building is not changed, the prior approval of the plaintiff being necessary to any such alteration or change involving an expenditure in excess of $25,000. Defendant's attempt to utilize the floor area ratio of plaintiff's building for defendant's building adjacent thereto does not constitute an addition to or alteration of the plaintiff's premises for the

benefit of the lessee thereof or of the lessee's tenants. It is rather the permanent disposition or elimination of the right to enlarge plaintiff's building. It is incontrovertible that the value of plaintiff's property will be less if its floor area ratio is severed and utilized for the benefit of the defendant's property. "The real inquiry in all cases is, whether there is damage done which injures the reversion. • • • This injury may be immediate, though the enjoyment of the reversion is postponed. The value of the property may be so much diminished that it will not bring the price in market that it would previously have commanded. This is a sufficient injury. • • • Good faith on the part of the tenant is no defense • • •" (Agate v. Lowenbein, 57 N. Y. 604, 614).

Order filed.

APPENDIX B-1

(Order of Appellate Division Reversing Special Term)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 21st day of January, 1971.

Present—Hon. Louis J. Capozzoli, *Justice Presiding,*

Owen McGivern,
Emilio Nunez,
James B. H. McNally, *Justices.*

3001
05763/1970

NEWPORT ASSOCIATES, INC.,

Plaintiff-Appellant,

against

SHELDON S. SOLOW,

Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from an order and judgment (one paper) of the Supreme Court, New York County (Postel, J.), entered on July 21, 1970, granting defendant's motion for summary judgment dismissing the complaint and denying plaintiff's cross-motion for summary judgment, and said appeal having been argued by Mr. Leo Brady of counsel for the appellant, and by Mr. Milton R. Friedman of counsel for the respondent; and due deliberation having been had

thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same is hereby reversed, on the law; appellant shall recover of respondent $50 costs and disbursements of this appeal; and declaratory judgment directed restraining the defendant from utilizing the unused floor area ratio applicable to plaintiff's real property located at 4 West 58th Street in the Borough of Manhattan for the benefit of the defendant's property located at 10-40 West 58th Street. The Clerk is directed to enter judgment accordingly, with costs.

Enter:

HYMAN W. GAMSO
Clerk.

APPENDIX C

(Opinion of Postel, *J.*, at Special Term)

SUPREME COURT

NEW YORK COUNTY

NEWPORT ASSOCIATES, INC.,

Plaintiff,

against

SHELDON H. SOLOW,

Defendant.

POSTEL, J.:

In this action to compel the determination of a claim to real property pursuant to Real Property Actions & Proceedings Law, Article 15, each of the parties moves for summary judgment.

The facts are substantially undisputed. Plaintiff is the owner of premises located at 4 West 58th Street in Manhattan, and by mesne assignments, the defendant is the entire lessee thereof. The defendant has exercised options to renew the lease until the year 2052. Under the terms of the lease, the tenant may make such alterations, additions and improvements as it requires, subject to the approval of the landlord. Although the building on the fee is many stories tall, under the New York City Zoning Law there exists an unused floor area ratio available for further construction. The defendant owns the property contiguous to this leasehold and has obtained a substantial mortgage loan together with municipal approval for the construction of a 45-story building theron. As part of such municipal approval, the defendant has been permitted to adopt

for his own building the unused floor area ratio or "air rights" of the adjoining premises he leases from the plaintiff. The floor area ratio, determined under the zoning law, gives the defendant an additional 30,000 square feet of floor area to his new building.

The plaintiff commenced this action to enjoin the defendant from using these air rights, contending, inter alia, that it will deprive the plaintiff of their future use and income. By way of defense and counterclaim, the defendant contends that as the long-term prime tenant of plaintiff's existing structure and as the fee owner of the proposed adjoining structure on a contiguous parcel, he is the "owner" of one zoning lot as defined under New York City Zoning Resolution § 12-10 and that such dominant-servient air right use is permitted.

On the instant motion, the defendant urges that since the lease permits the tenant to alter the building, by implication, alteration includes using the available air rights. The defendant also offers to give sufficient security to assure performance of the lease and the use of the air rights, so that the plaintiff will not be prejudiced in the event of a default. He further urges that under these circumstnces the immediate construction of the new building with the additional air rights will contribute substantially to the city's economy by creating more taxable property, rental space and jobs.

The plaintiff contends, inter alia, that the use of the air rights constitutes a deprivation of its property for the benefit of another premises, and that the air rights constitute a valuable asset saleable to any builder on the parcel contiguous to the east, because it would enhance the permitted floor area ratio of such contiguous parcel.

The essential question appears whether the tenant has also rented the plaintiff's air rights without additional monetary obligation, and as a corollary whether these rights are transferable to an adjoining building. Whether

the plaintiff can sell his air rights to the fee owner of the contiguous parcel to the east, as plaintiff suggests, is speculative, in the absence of a firm offer and acceptance. Neither counsel has shown, nor has the Court been able to find any case dealing with these facts. The facts and peculiar circumstances shown yield, however, in favor of the defendant, because of his complete physical control of both buildings for the apparent life of the structures. This complete physical control effectively welds the two structures into one floor area ratio. Indeed, this intent is written into the zoning law by permitting development under this very circumstance (NYC Zoning Resolution § 12-10 Zoning Lot).

A remaining question is raised whether the use of these air rights was contemplated by the lease and whether a fair consideration was paid. While the Court will not rewrite a contract for the parties, it will give a reasonable construction to its terms. The tenor of the lease lies in section 4.03 thereof which provides: "Lessee may make such additions, alterations and changes to the Premises as will suit Lessee's convenience and requirements of its business * * *" the approval of "* * * which Lessor covenants shall not be unreasonably withheld." In essence, the defendant has leased the entire building including the right to make an "addition". If defendant were to use the entire available floor area ratio permitted by the zoning resolution he would do so by making an "addition" to the plaintiff's premises. There is no extra rent stipulated in the lease for this right and no one other than the defendant can make the addition. Nor can the plaintiff-landlord unreasonably withhold this right to make an addition. The defendant-tenant, because of the contiguity of his own parcel, has elected to make the addition not to the leased premises but to his own fee adjoining. The distinction is ethereal; the damages to plaintiff, if any, are remote and

speculative, when viewed in the light of the term of the lease and probable life of the two structures. Indeed, it is not unreasonable to assume that the defendant has also leased the air space to plaintiff's building when given the right to make improvements. It is, however, unreasonable and capricious to deny this improvement upon the insistence of further rent.

Accordingly, the motion for summary judgment is granted in favor of the defendant-tenant and the plaintiff's cross-motion is denied.

Settle order.

Dated: June 16, 1970

/S/ POSTEL
J.S.C.

APPENDIX C-1

(Order and Judgment of Special Term)

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, in the Borough of Manhattan, City of New York, on the 20th day of July, 1970.

PRESENT:

HONORABLE GEORGE POSTEL,
Justice

NEWPORT ASSOCIATES, INC.,
Plaintiff,

against

SHELDON H. SOLOW,
Defendant.

Defendant having duly moved this Court by order to show cause dated April 14, 1970, for an order directing that summary judgment be entered in favor of Defendant and against the Plaintiff, dismissing the complaint on the ground that the cause of action alleged in the complaint has no merit, and Plaintiff having applied for summary judgment striking the answer herein in its papers in opposition to this motion,

Now, on reading and filing the complaint, answer and reply to the counterclaim, the order to show cause dated April 14, 1970, the affidavit of Sheldon H. Solow sworn to

April 14, 1970, with the exhibits thereunto attached, in support of the motion, the affidavit of Sol Goldman sworn to April 27, 1970, with the exhibits thereunto attached, in opposition to the motion and in support of its cross-motion for summary judgment in favor of Plaintiff, and said motions having duly come on to be heard at a Special Term, Part I, of this Court on the 17th day of April, 1970, and the Defendant having appeared by Parker, Duryee, Zunino, Malone & Carter, his attorneys, in support of the motion and in opposition to Plaintiff's cross-motion for summary judgment, and Plaintiff having appeared by Gordon, Brady, Keller & Ballen, its attorneys, in opposition to Defendant's motion and in support of its cross-motion, and due deliberation having been had thereon and the Court having made and filed its opinion herein, it is

ORDERED that Defendant's motion for summary judgment be and it hereby is in all respects granted; and it is further

ORDERED that the complaint be and the same hereby is dismissed; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment be and it hereby is denied; and it is

Adjudged, Decreed and Declared that Defendant, in erecting a building upon the premises in the Borough of Manhattan, City, County, and State of New York, known as and by the street numbers 9-25, inclusive, West 57th Street and 10-40, inclusive, West 58th Street, is authorized to use in its construction the unexpended and unused floor area ratio permissible and attributable to the premises in the Borough of Manhattan, City, County and State of New York, known as and by 4 West 58th Street and more par-

ticularly described as follows:

All that parcel of land situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

Beginning at a point on the southerly side of 58th Street, distant one hundred thirty-five feet westerly from the corner formed by the intersection of the southerly side of 58th Street with the westerly side of Fifth Avenue; running thence southerly parallel with Fifth Avenue, one hundred feet five inches to the center line of the block; thence westerly along the said center line of the block, sixty-five feet; thence northerly parallel with Fifth Avenue through a party wall, one hundred feet five inches to the southerly side of 58th Street, and thence easterly along the southerly side of 58th Street, sixty-five feet to the point or place of beginning;

and it is further

ORDERED that judgment be entered herein by the Clerk of this Court in favor of the Defendant, Sheldon H. Solow, and against the Plaintiff, Newport Associates, Inc., for the costs and disbursements of this action to be taxed by the Clerk of the Court.

ENTER

/s/ G. P.
Justice of the Supreme Court

Filed July 21, 1970

New York County Clerk's Office

APPENDIX D

(Constitutional and Statutory Provisions Involved)

1. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

§ 1. • • • • •

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The New York City Zoning Resolution (pp. 18-19) adopted on December 15, 1960, to become effective one year later on December 15, 1961, provides as follows:

§ 12-10 Zoning Lot

A "zoning lot" is either:

(a) A lot of record existing on the effective date of this resolution or any applicable subsequent amendment thereto, or

(b) A tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single *block*, which, on the effective date of this resolution or any applicable subsequent amendment thereto, was in single ownership, or

(c) A tract of land, located within a single *block*, which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy), is designated by its owner or developer as a tract all of which is to be used, *developed*, or built upon as a unit under single ownership.

Appendix D

A *zoning lot* therefore may or may not coincide with a lot as shown on the official tax maps of the City of New York, or on any recorded subdivision plat or deed.

For the purpose of this definition, ownership of a *zoning lot* shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration.

A *zoning lot* may be subdivided into two or more *zoning lots,* provided that all resulting *zoning lots* and all *buildings* thereon shall comply with all of the applicable provisions of this resolution. If such *zoning lot,* however, is occupied by a *non-complying building,* such *zoning lot* may be subdivided provided such subdivision does not create a new *non-compliance* or increase the degree of *non-compliance* of such *building.*

(Italicized words so appear in Zoning Resolution.)